In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-143

ROY SPLAWN, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Three

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Three, affirming the judgment of the trial court was filed on March 29, 1976, but has not been and will not be officially reported and published. See *California Rules of Court,* Rule 976. The opinion is set out in full as Appendix A of the Petition For Certiorari.

JURISDICTION

On June 22, 1971, Petitioner was convicted in the Superior Court of the State of California for the

County of San Mateo of a violation of California Penal Code Section 311.2, the obscenity statute. (A 15, 26) On July 26, 1971, judgment was entered upon the conviction and an appeal was timely perfected in the California Court of Appeal, which affirmed the judgment in an opinion filed on January 11, 1973. (A 18) A Petition for Hearing in the California Supreme Court was timely filed on February 16, 1973, and was denied without opinion on March 8, 1973. (A 18-20)

A Petition for Certiorari was then filed with this Court. Certiorari was granted, the judgment of the Court of Appeal was vacated and the case was remanded for reconsideration in light of *Miller v. California,* 413 U.S. 15, and its siblings. *Splawn v. California,* 414 U.S. 1120.

Thereafter, the California Court of Appeal once again affirmed the conviction. A Petition for Hearing before the California Supreme Court was denied on May 26, 1976, by an order, a copy of which is set out as Appendix B of the Petition for Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, provides, in material part, that:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Penal Code Section 311.2 provided, at the time of this case, that:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.
>
> (b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place where he is so employed.

4. California Penal Code Section 311 provided, at the time of the offense, Stats. 1961 ch. 2147, that:

(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance.

(b) "Matter" means any books, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene.

5. United States Constitution, Article I, Section 10, provides, in part, that:

No State shall . . . pass any . . . ex post facto Law.

QUESTIONS PRESENTED

1. Was Petitioner subjected to an *ex post facto* application of California obscenity law where he was convicted by the use at trial of a "pandering" law

which was not in force at the time of the offense and with which he was not charged in the Information?

2. In an obscenity prosecution of a retail bookstore owner not shown to have any connection with the creator or publisher of the matter in question, is it constitutional to instruct the jury that the financial motives of the creator of the material could be considered evidence that the material was "obscene"?

3. Is a retail bookstore owner denied due process when his conviction of an obscenity violation is based on the motives and behavior of persons with whom he has no connection and over whom he has no control?

4. Is an obscenity conviction premised upon "pandering" constitutionally permissible where there is no evidence of commercially exploitative behavior by the defendant?

STATEMENT OF THE CASE

Petitioner, Roy Splawn, his brother Don and one other person, Robert Esselstein, were charged, on November 19, 1969, with one count of felony conspiracy. (A 22) The Complaint and subsequently the Information, each charged a conspiracy to commit a misdemeanor violation of California Penal Code §311.2, the California obscenity statute. The conspiracy was charged to have commenced on August 1, 1969, and to have terminated on November 7, 1969. Each defendant was also charged with a misdemeanor Penal Code §311.2 obscenity violation. After pleas of not guilty,

and appropriate motions, which were denied, jury trial started on June 7, 1971. (A 2) On June 18, the People moved to dismiss the charges against the defendant Esselstein, which motion was granted. On June 22, the jury returned verdicts of Not Guilty as to all counts against Donald Splawn, a verdict of Not Guilty as to the Felony Conspiracy count against petitioner Roy Splawn, and a verdict of Guilty against petitioner Roy Splawn on the misdemeanor count of violation of California Penal Code Section 311.2—the obscenity statute. (14-15, 25-28)

On July 26, petitioner's motion for probation was denied and he was sentenced to ninety-one (91) days in the County Jail, one (1) day suspended, and ordered to pay a fine of one thousand dollars ($1,000.00) plus state assessment. (A 29-31) Bond on Appeal of twelve hundred fifty dollars ($1,250.00) was posted and the execution of the sentence stayed pending appellate review. (A 29)

EVIDENCE AND INSTRUCTIONS

I

On July 31, 1969, a Redwood City, California, reserve police officer, who was a carpetlayer by trade, went, in an "undercover" capacity, to a bookstore owned by petitioner. (R.T. 27-8).[1] There he found petitioner's brother, Don, working behind the sales counter. The policeman asked to see petitioner Roy

[1] "R.T." refers to the Reporter's Transcript. "C.T." refers to the Clerk's Transcript.

Splawn, about purchasing some "hard-core" films. (The term appears to have been first used by the officer. (R.T. 320).) (R.T. 28). Although the store sold materials with sexual content, no such films were carried in the store. (R.T. 28, 318-321, 516-7, 573-5). In fact, the police knew this, for they had made purchases of material regularly for sale in defendant's store, but no prosecutions had been commenced as a result of those purchases. (R.T. 381).

The officer was told to return the next day. (R.T. 29). When he so returned neither petitioner Roy Splawn nor the requested films were present (R.T. 30).

The officer left and the matter was apparently dropped until November 4, 1969. On November 4 and 5, the officer made repeated contacts with Don Splawn in an attempt to buy films, which were still not for sale in the store. (R.T. 32). Finally, in the evening of November 5, the officer found petitioner Roy Splawn in the store, and told him he wanted "hard-core" movies. (R.T. 46-47).

Petitioner told the officer that he did not have any such films but that he could get them from San Francisco. (R.T. 47). The officer told Splawn that he was in a hurry to get the films, and Splawn told the officer that he, the officer could, if he wished, go to San Francisco and get them himself. (R.T. 338). The officer declined this offer.

On November 7, 1969, the officer came to petitioner's store, where he obtained from Robert Esselstein, a clerk, a package containing two reels of film

which graphically displayed sexual behavior, for which he paid seventy dollars. (R.T. 5, 96).

Roy Splawn was convicted for distributing those two reels of film.

II

The offense of which Petitioner was convicted was not charged by the prosecution in the context of the circumstances of production, distribution or publicity of the films in question. No reference to any pandering activity is found in the Information. (A 22)

Three days *after* the date of Petitioner's offense, an amendment to California's obscenity law became effective, which provided that:[2]

> In prosecutions under this chapter where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

P.C. 311(a)(2), effective November 10, 1969; see California Codes, Effective Dates of Laws, 1969.

Nevertheless, the trial court permitted photographs which showed the condition of the premises to be introduced into evidence on the issue of the obscenity of the material. (R.T. 77-83). The trial court instructed the jury on the issue of "pandering", as follows:

> (1) [I]n determining the question of whether the allegedly obscene matter is utterly without redeeming social importance, you may consider the circumstances of sale and distribution, and particularly whether such circumstances indicate that the matter was being commercially exploited by the defendants for the sake of its prurient appeal. Such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance. The weight, if any, such evidence is entitled is a matter for you, the Jury, to determine. (R.T. 882). (A 38)
>
> (2) Circumstances of production and dissemination are relevant to determining whether social importance claimed for material was in the circumstances pretense or reality. If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter [is] utterly without redeeming social importance. (R.T. 883). (A 39)
>
> (3) If the object of work is material gain for the creator through an appeal to the sexual curiosity and appetite by animating sensual detail to give the publication a salacious cast, this may be considered as evidence, that the work is obscene. (R.T. 883). (A 40)

[2]Without this amendment, the California Supreme Court had held that the prosecution could not go to the jury on a "pandering" theory, at least where "pandering" was not charged in the indictment or information. ***People v. Noroff,*** 67 C.2d 791 (1967).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

1. Petitioner objected to the trial court's instructions on pandering (R.T. 755-758) and to the introduction of evidence of pandering (R.T. 77-83) and both on appeal (Appellate's Brief p. 30-33) and in his Petition for Hearing in the California Supreme Court (p. 17-19) urged:

(a) that the giving of any "pandering" instructions constituted a retroactive *ex post facto* application of the law and

(b) that the instructions given on "pandering" denied him both his due process and free speech rights under the federal constitution.

These contentions were rejected by the trial court, the Court of Appeal (Petition for Certiorari, Appendix A, pp. viii-ix), and inferentially, by the California Supreme Court (Appendix B).

SUMMARY OF ARGUMENT

I

The California Court of Appeal has here held that the state legislature, when it passed Penal Code Section 311(a)(2), intended to pass only an evidence rule which could be properly applied retroactively. But, as the statute permitted a conviction on less and different evidence, denied Petitioner a vested right, made behavior criminal which had been innocent, and affected petitioner to his detriment, the statute's retroactive application to Petitioner was an *ex post facto* application of the law in contravention of Article I, Section 10 of the United States Constitution.

Further, the California Supreme Court in 1967 had held, in *People v. Noroff*, 67 C.2d 791, that "pandering" evidence could not be used to obtain a conviction absent an enabling statute. The application of pandering doctrine to petitioner in the absence of statute was thus unexpected and indefensible, and therefore deprived Petitioner of due process fair warning. *Bouie v. Columbia*, 378 U.S. 347.

II

A.

The facts of this case fail to show commercially exploitative behavior by Petitioner and the California Court referred to none. Yet California pandering law was applied at Petitioner's trial. Because California pandering law does not permit fair consideration of the entire context of a sale of sexual material but focuses only on exploitative behavior, its application must be limited to cases where such behavior can be fairly said to exist. Thus, because California pandering doctrine was applied to non-exploitative commercial activity which is constitutionally protected, it was applied in a constitutionally overbroad manner. And because the pandering law was applied in the absence of evidence of exploitation, petitioner was denied due process.

B.

The construction of California law by this case, and by *People v. Kuhns,* 61 C.A.3d 735, has resulted in a state statute which on its face is unconstitutionally uncertain, in that it is both overbroad in a first amendment sense and vague in a due process sense.

III

The instructions given in this case permitted the jury to make determinations about the nature of the material based on its sexual provocativeness, and based on the motives and behavior of persons who were not on trial. These instructions exceed the limits of permissible constitutional uncertainty and are overbroad and vague. Additionally, permitting the material to be judged by the behavior of others with whom petitioner had no connection denied him due process.

The cumulative effect of the errors resulted in an unfair, unconstitutional conviction.

ARGUMENT

I

PETITIONER WAS UNCONSTITUTIONALLY SUBJECTED TO AN EX POST FACTO APPLICATION OF CALIFORNIA "PANDERING" LAW.

A.

In 1961, California enacted its obscenity law, California Penal Code Section 311 et seq., patterned upon the then current obscenity doctrine of this Court.

In 1966 this Court decided *Ginzburg v. U.S.,* 383 U.S. 463, which held, for the first time, that in federal obscenity cases, under appropriate circumstances, the evidence relevant to a determination of the character of the material in question could go beyond the four corners of the material to evidence of the behavior relative to the material of those on trial. Such behavior was characterized as "pandering".

In 1967, the California Supreme Court decided *People v. Noroff,* 67 C.2d 791. In *Noroff,* the trial judge had decided that the material in question was, on its face, not obscene as a matter of law. The State appealed, urging the trial court's ruling was erroneous because the State had a right to go to the jury on a "pandering" theory. *Id.* at 793. The California court rejected that position, holding that "pandering" evidence could not be used to obtain an obscenity conviction absent an enabling statute, at least where such behavior was not charged in the Indictment or Information. *Id.* at 793. The California Supreme Court specifically disapproved an earlier California Court of Appeal case, *Landau v. Fording,* 245 C.A.2d 820, which had suggested that "pandering" doctrine could be applied absent an enabling statute. *Noroff,* at 793.

In 1969, in apparent response to *Noroff,* the California legislature amended its obscenity law to add Penal Code Section 311(a)(2), which made "pandering" evidence potentially relevant to some aspects of an obscenity determination. At the time, the California constitution provided that laws went into effect sixty-one days after adjournment of the Legis-

lature, California Constitution Article 4, Section 8. Laws passed by the 1969 Legislature went into effect on November 10, 1969. See West's California Penal Code, "Effective Dates of Laws, 1969."[3]

Petitioner's conviction is for a sale of obscene material occurring on November 7, 1969, which sale allegedly involved behavior by Petitioner and others occurring from July 31 through November 7, 1969. At petitioner's trial, evidence was introduced on a pandering theory, and the jury was instructed on a pandering theory.

B.

A law which was not in effect when Petitioner engaged in the behavior for which he stands convicted was applied at his trial to determine his guilt. The basic question, whether petitioner was treated unconstitutionally, can be more specifically analyzed from two approaches. The California Court of Appeal has held, *Petition for Certiorari,* Appendix A, p. ix that the California Legislature intended "merely" to pass an evidence rule, which raises the question of whether the passage of the "pandering" statute, Section 311(a)(2), constitutes an *ex post facto* law when applied retroactively, in contravention of U.S. Constitution, Article I, Section 10. Alternatively, we can ask whether the California Court, when it applied the pandering law to Petitioner, engaged in judicial

[3]The statement of Respondent in its Opposition, pp. 6-7, that California obscenity law included the pandering sections at the time of petitioner's trial is incorrect, but the error appears inadvertent as Respondent used the correct date in the body of it Argument, see Opp., p. 13.

construction of a criminal statute which was unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue such that its application to petitioner would deprive him of the due process fair warning to which he is entitled. *Bouie v. Columbia,* 378 U.S. 347, 354.

The guidelines for determining which laws are *ex post facto* have been succinctly stated:

a) A law that makes an act done before the passing of the law, which was innocent when done, criminal; *Calder v. Bull,* 3 Dall. 386, 390.

b) A law that alters the legal rules of evidence and permits the reception of less, or different, testimony than the law required at the time of the commission of the offense in order to convict. *Ibid.*

c) A law which takes away or impairs a defense which the law has provided a defendant. *Kring v. Missouri,* 107 U.S. 221.

d) A law passed after the commission of an offense which alters the situation of a party to his disadvantage. *Ibid.*

Application of the foregoing tests show that Petitioner has been subject to an *ex post facto* retroactive application of California law in violation of Article I, Sec. 10 of the U.S. Constitution.

The California law changed the evidence which could be presented to determine if material was obscene, from evidence that the matter itself was prurient, offensive and lacked value, to evidence which included the manner in which it was used or dis-

seminated.[4] Without Penal Code §311(a)(2), dealers in sexual material could rely solely on the content of the material in evaluating whether to deal with it. With §311(a)(2), dealers were required to evaluate the "circumstances" of marketing their material to determine if the material could be found to be obscene in context.

Perhaps most significantly, without §311(a)(2) dealers in California could market their sexual material any way they pleased. After §311(a)(2), the scope of their right to sell, disseminate or publish such material became severely limited.

The incorporation of a pandering doctrine into California obscenity law materially changed the focus of California obscenity trials from the material alone to the material as disseminated by those on trial.

The pandering doctrine does nothing to help a defendant defend his case. While the way he treats the material may be used to show lack of social value, a defendant can derive no benefit from the pandering doctrine no matter how carefully and seriously he treats the material. A defendant is required to assess another complex factor in an already complex field. Miscalculation has detrimental results but correct evaluation brings no reward. Under such circumstances, the California pandering law clearly alters

[4]And, under the instructions given here by the trial court, evidence of "sexual provocativeness", and "motives" of the "Purveyor" and "creator" became relevant where such evidence was not before.

a defendant's situation to his disadvantage, and, as such, constitutes an *ex post facto* law when applied retroactively to Petitioner.

An *ex post facto* retroactive application of the pandering law also denies a defendant due process. *Bouie v. Columbia, supra.* Here, petitioner had no notice that his marketing behavior could affect the question of the obscenity of the material, no notice that his behavior had to meet some standard, and no notice of the basis of the standard.

Not only did petitioner have no notice that he was under a duty to conform his behavior to some standard, but he was lulled into a false sense of security by the California courts. *Bouie, supra,* at 352. While Petitioner would not concede that California obscenity law was ever narrow and precise, it nevertheless, before §311(a)(2), limited itself to the material in question. In light of *People v. Noroff, supra,* which rejected a non-statutory pandering rule, the appearance to petitioner of the status of California law as of the time of his behavior, *Bouie, supra,* at 354, was such that the application of pandering law to his case was unexpected and indefensible, *Ibid.,* especially where no pandering charge was made in the Information. cf. *Cole v. Arkansas,* 333 U.S. 196.

Thus, petitioner has been denied due process and has been subjected to the retroactive application of a criminal law in violation of the *ex post facto* clause of Article 1, Section 10 of the United States Constitution.

II

CALIFORNIA PANDERING LAW HAS BEEN OVERBROADLY CONSTRUED BY THE CALIFORNIA COURT AND IMPROPERLY APPLIED TO PETITIONER TO CONVICT HIM IN THE ABSENCE OF EXPLOITATIVE BEHAVIOR.

A.

The only facts stated by the California Court of Appeal in this case are that petitioner Splawn was the owner of a bookstore and that he sold two films for $70.00. The record shows that the films were not regularly sold in his store, the films were never advertised, and the buyer had to make at least six attempts to obtain the film before he was successful.

This is not a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients, cf. *Miller v. California,* 413 U.S. 15. None of the facts in this case show commercial exploitation of the films sold. Therefore, if the pandering doctrine can be applied to Petitioner, it can be applied in every obscenity case. And if, as construed by the California Court, the pandering doctrine is applicable to petitioner and to every other obscenity defendant, then the pandering law is being applied overbroadly and therefore unconstitutionally.

Ginzburg v. U.S., 383 U.S. 463, while it permitted evidence of pandering, recognized that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Id.,* at 474; *New York Times v. Sullivan,* 376 U.S. 254. The pandering doctrine is designed to permit control of excessive, exploitative behavior, not to penalize normal commercial activity.

The pandering doctrine relaxes and changes some of the requirements necessary to a finding of obscenity. It adds another complex factor and another layer of uncertainty to a field which, definitionally, appears to be at the limits of tolerable ambiguity. And, as formulated by the California legislature and construed and applied to booksellers, such as petitioner, it is an unfair rule which can be used by the prosecution to assist it in obtaining a conviction but cannot produce any benefit for a deserving defendant. The instructions here permitted the jury to consider behavior evidence to determine whether the material was obscene or lacked social value. But no corresponding instruction told the jury that it could consider lack of exploitation, or other behavior, as evidence that the material had value or was not obscene.

If the question of obscenity is to include "consideration of the setting in which the publications were presented", *Ginzburg, supra,* at 465, and if the central focus of the trial is to be the behavior of those on trial, *Roth v. U.S.,* 354 U.S. 476, Warren, C. J. concurring, then jury instructions should permit the jury to evaluate whether a defendant treated material in a neutral or in a serious way, as well as in an exploitative way. But California's law does not permit fair consideration of the entire context of a sale of sexual material; only the exploitative aspects are relevant.

To the extent, then, that California pandering rules are designed only to deal with exploitative behavior, they should be limited to situations where that behavior is present. If California's rules can be applied to change the nature of a trial where only non-ploitative commercial activity is present, then the pandering doctrine is being overbroadly applied to constitutionally protected behavior and is thus being unconstitutionally applied. *Gooding v. Wilson,* 405 U.S. 518; *Erznoznik v. City of Jacksonville,* 422 U.S. 205; *Hynes v. Mayor of Oradell,* ..... U.S. ....., 48 L.ed.2d 243; *Lewis v. New Orleans,* 415 U.S. 130.

Approaching this question from another point of view, it is unconstitutional to apply California pandering law in the absence of exploitative behavior, because it results in a conviction premised on behavior for which there is no evidence. *Vachon v. New Hampshire,* 414 U.S. 478. Where, as here, the record is devoid of evidence, even on one element, to support a conviction, the conviction must be reversed. *Taylor v. Louisiana,* 370 U.S. 154; *Johnson v. Florida,* 391 U.S. 596; *Garner v. Louisiana,* 370 U.S. 157; *Shuttlesworth v. Alabama,* 382 U.S. 87.

B.

Petitioner filed his Petition for Certiorari on July 31, 1976. At that time Petitioner did not mount a facial attack upon California's pandering law, because a more selective and particularized approach appeared capable of achieving an appropriate result. Direct assault on the statute did not seem warranted.

Since the filing of the Petition, however, the California Court of Appeal has held that it is appropriate to apply pandering doctrine to a mere store clerk who had no control over, nor anything to do with, the production, presentation of publicity of the material or the store in which it was sold. *People v. Kuhns,* 61 C.A.3d 735 (9/8/76). It is thus now clear that California pandering law will be applied in all obscenity cases.

Under the circumstances, petitioner feels it necessary to assert that California pandering law is facially overbroad and vague and therefore unconstitutional. The Court will no doubt wish to consider whether this claim can be said to be fairly within the questions on which certiorari was granted. See Supreme Court Rules, Rules 40(a)(1) and (2).

The law is overbroad because, as construed, every type of vending or display, no matter how neutral or restrained, can be argued to be pandering. *Erznoznik v. Jacksonville, supra.* Under *Kuhns,* even knowledge alone by an employee without authority can be argued to be pandering. Thus, protected speech activity can be attacked, limited and proscribed under the law. Alternatively, the law is vague because it fails to give notice of what a dealer or employer can do to avoid pandering. *U.S. v. Harris,* 347 U.S. 612.

Several examples will suffice.

1. The retail dealer can limit the material in his store to that with sexual content. He can acquire material by purchase or consignment and display the

covers of the material to customers. Magazines and books are universally sold by a display of their covers. The virtue of this way of doing business is that the dealer can avoid problems with juveniles and persons who are offended by sexual material who might come into the store for other items if they were available.

However, under California's law, the dealer could be accused of pandering on the theory that the concentrated display of sexual magazines and book covers was exploitative.

2. To avoid the charge that he is concentrating on sexual material, the retailer now branches out to a general magazine store. While he may avoid pandering problems, he is subjected to complaints from persons who do not wish the material exposed and available and has a continual discipline problem with juveniles who now have an excuse to come into the store. The retailer now rightfully concerned that he will be prosecuted for display of harmful sexual matter to juveniles, perhaps solely on the basis of the covers of the material. See, for example, California Penal Code Sections 313 *et seq.; Ginzburg v. New York,* 390 U.S. 629.

3. To avoid the problem with juveniles, the retailer then creates a special section for the sexual material, controls access to the area, and indicates generally that the material is "adult". Under California law, the dealer can still be charged with pandering, on the theory that he has called attention to his sexual material by segregating it, and impliedly

suggested that it is potentially prurient by treating it differently than other material. Even his use of the term "adult" with respect to the material is subject to a charge of pandering, on the theory that the term "adult" is now a euphemism for sexually graphic material.

4. The clerk in the retailer's store who has no authority over what stock is sold or how it is displayed would like to know how he can avoid a charge that he is a panderer if he sells the sexual material in the store. The answer is, apparently, that he cannot.

The above examples indicate how the overbroad and vague interpretation and application of California pandering law seriously affects the exercise of the first and fourteenth amendment rights of retail vendors such as petitioner. cf. *Dombrowski v. Pfister,* 380 U.S. 479. The open ended interpretation of the statute by the California Courts afford ample opportunity for abusive application. cf. *Lewis v. New Orleans, supra,* Powell, J. concurring.

III

CALIFORNIA PANDERING LAW, AS CONSTRUED AND APPLIED, IS UNCONSTITUTIONALLY UNCERTAIN AND IMPERMISSIBLY PERMITS THE MATERIAL IN QUESTION TO BE JUDGED BY THE BEHAVIOR OF PERSONS NOT ON TRIAL; THESE INFIRMITIES CUMULATIVELY DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND FREE SPEECH.

A.

The constitutional rules which require definiteness have two bases. The due process basis is that a person has a right to fair notice that his contemplated conduct is forbidden before he can be punished for it. *U.S. v. Harriss,* 347 U.S. 612; *Lanzetta v. New Jersey,* 306 U.S. 451; *Bouie v. Columbia,* 378 U.S. 347. The free speech basis is that laws involving speech must be sufficiently specific so as not to infringe upon or inhibit protected speech. *Erznoznik v. Jacksonville, supra.* Underlying both notions is a concern that the trier of fact should have definite guidelines. *United States v. Petrillo,* 332 U.S. 1.[5]

Everyone now frankly recognizes that materials with sexual content are going to be regulated by standards which lack precision, *Miller v. California,* 413 U.S. 15, fn. 10; *Paris Adult Theater I v. Slaton,* 413 U.S. 49, Brennan, J. dissenting. A majority of this Court feel that the degree of ambiguity is constitutionally tolerable. *Ibid.* But it appears obvious

[5]Sometimes the two doctrines become intertwined, see *Cox v. Louisiana,* 379 U.S. 536, as a basis for this Court's action. Often this Court finds a statute to suffer from both overbreadth and vagueness, *Coates v. Cincinnati,* 402 U.S. 611; *Keyishian v. Bd. of Regents,* 385 U.S. 589.

that we are close to the limits of acceptable uncertainty and that our notions of prurience, offensiveness and seriousness need refining, not expanding.

It would seem that the Court agrees, for attempts to enlarge the definitions regulating sexual material have uniformly failed. Thus, for example, this Court has struck down laws seeking to censure material which was offensive and vulgar, *Cohen v. California,* 403 U.S. 15, which could corrupt public morals, *Ashton v. Kentucky,* 384 U.S. 195, which could "appeal to the lust of persons under eighteen or to their curiosity as to sex or to anatomical differences between sexes," *Rabeck v. New York,* 391 U.S. 462, and which involved "sexual promiscuity", *Interstate Circuit v. Dallas,* 390 U.S. 676. See *Id.,* at 682, and fn. 10.

The construction given California pandering law by approval of the instructions in this case suffers from both vices of indefiniteness: it is vague and overbroad, and thus constitutionally intolerable for regulating sexual material.

1. The instructions permit evidence of sexual provocativeness to determine the presence of social importance. But sexual provocativeness is not prurience. Sexual provocativeness has been part of our culture for decades. Pin-ups are part of our American heritage. Everything from cars to chewing gum has been sold using sexually provocative methods. Changing the test from prurience to provocativeness crosses the line of permissible ambiguity not only because it undercuts this Court's First Amendment requirements for obscenity but because it is too vague to

give fair notice and guidance to citizens and juries. It is at least as vague as "sexual promiscuity", *Interstate Circuit v. Dallas, supra.*

And if the presence of prurience and the absence of social value are viewed as two sides of the same coin, see *A Book v. Attorney General,* 383 U.S. 413, White, J. dissenting, then provocativeness cannot become part of the obscenity test without substantial distortion of the entire definition.[6]

2. The instructions make the financial motives of the creator evidence that the material is "obscene", which means evidence that material is prurient, offensive, and without value. Requiring, in the obscenity field, that one assess the motives of another to determine the character of the material in ques ion is so general and vague that no fair notice is possible and is hardly anything more than an invitation to a jury to apply its uninformed prejudices.

B.

> The main principle of just criminal punishment, one that is generally regarded as self-evident, is that one shall never be answerable for the crime of anyone else . . .
>
> Cohen, Moral Aspects of Criminal Law, 49 Yale L.J. 987, 1007.

[6]It should also be noted that insofar as the instruction permits the existence of one fact, sexual provocativeness, to form the basis for an inference that another fact exists, lack of social value, the instruction suggests other constitutional difficulties. cf. *McFarland v. American Sugar Refining Co.,* 241 U.S. 79; cf. *Pollock v. Williams,* 322 U.S. 4.

In this case, the trial of a retail seller, the jury was told that circumstances of production could be considered to determine if exploitation was present, and was told to look to the "purveyor's" emphasis, and to look to financial motives of the creator of the material to determine if the material was obscene. These instructions invited the jury to refocus on the material and judge it with reference to the motives and behavior of persons who were not on trial and with whom petitioner had no connection.

The instructions stood the pandering doctrine on its head, for that doctrine is supposed to relate determination of the character of the material to its treatment by a defendant. Instead, the character of the material was determined relative to its treatment by others not on trial. This is, fundamentally, a denial of due process. It frankly permitted petitioner to be convicted because of his association with the material and with asserted behavior patterns and characteristics of those who created and produced the material. This is guilt by association, roundly condemned in *DeJonge v. Oregon,* 299 U.S. 353.

C.

It is clear that California's error has been to unthinkingly graft a new doctrine, narrowly applied to a specific set of facts by this Court, onto its state obscenity law, and then try to apply it broadly to every obscenity defendant. The error was compounded by the unfortunate selection of isolated passages from

Ginzburg, which involved a creator and producer, and their application to petitioner, a retail vendor.

Perhaps some of these instructions might be proper in another context, involving a defendant with a different status. Perhaps the law can still be saved by a narrowing construction. Here, however, the cumulative effects of the lack of certainty and the misfocus on the behavior and motives of others combined to deny petitioner his rights.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court to reverse his conviction.

Dated, January 6, 1977.

Respectfully submitted,

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